

# Professional Responsibility Notes

*Standards of Conduct Office, OTJAG*

## Dating Follies and Other Shenanigans

The Standards of Conduct Office (SOCO) normally publishes summaries of ethical inquiries that have been resolved after preliminary screenings. Those inquiries which involve isolated instances of professional impropriety, poor communications, lapses in judgment, and similar minor failings typically are resolved by counseling, admonition, or reprimand. More serious cases, on the other hand, are referred to The Judge Advocate General's Professional Responsibility Committee (PRC).

The following two PRC opinions, which apply the Army's *Rules of Professional Conduct for Lawyers (Army Rules)*,<sup>1</sup> the *Joint Ethics Regulation (JER)*,<sup>2</sup> and other regulatory standards<sup>3</sup> to cases involving allegations of attorneys' attempts to date clients, are intended to promote an enhanced awareness of professional responsibility issues and to serve as authoritative guidance for Army lawyers. To stress education and to protect privacy, we edited the PRC opinions to change the names and installations of the subjects.<sup>4</sup> Mr. Eveland.

### Professional Responsibility Opinion 95-1

*Army Rule 1.7(b)*

*(Conflict of Interest: Lawyer's Own Interests)*

*Army Rule 2.1*

*(Exercising Independent Professional Judgment)*

*Army Regulation (AR) 27-1, para. 7-3d*

*(Preponderance of Evidence Required to Establish Violation of Ethical Standards)*

*Allegation that attorney improperly asked his military domestic relations client for a date was not established by a preponderance of the evidence.*

*Army Rule 8.4(a)*

*(Lawyers Shall Not Counsel or Assist in Criminal Conduct)*

*Attorney properly counseled military domestic relations client that adultery was a crime under UCMJ, and if she did have extramarital relations not to tell anyone.*

## Facts

First Lieutenant A is a male legal assistance attorney at Fort Strong. On 9 December, Lieutenant A advised Sergeant C, a female NCO, during an office visit in connection with her marital separation.

Sergeant C alleges that during the course of the appointment, Lieutenant A advised her not to have sexual relations outside her marriage, but if she did, not to tell anyone. Sergeant C also alleges that as she was leaving Lieutenant A's office, he asked if she wanted to go out for drinks. She alleges that when she declined, he offered his business card with his home telephone number, and he explained that the card and number were provided in case she changed her mind.

When discussing the details of a separation agreement, Sergeant C told her husband (Mr. C) that a legal assistance attorney had asked her out on a date. On 20 January, Mr. C contacted the Fort Strong Deputy Staff Judge Advocate (DSJA) to report the incident. Sergeant C and her husband have since reconciled.

Sergeant C was extremely reluctant to provide information about the incident. Both Sergeant C and her husband indicated that her reluctance to provide information was because she did not want to hurt the attorney involved. Sergeant C initially agreed to meet with the DSJA on 27 January and provide a statement. However, on 26 January, she called the DSJA and canceled the appointment stating that she did not want to go through with it. She agreed to discuss the incident on the telephone and did verify that Lieutenant A was the attorney involved. She refused, however, to give a sworn statement.

The DSJA repeatedly attempted to get a statement from Mr. C, but Mr. C did not return the DSJA's telephone calls.

In March, the Fort Strong Staff Judge Advocate (SJA) conducted a preliminary screening inquiry (PSI) and concluded that Lieutenant A attempted to date Sergeant C and provided her unclear advice concerning extra-marital relations. The SJA recommended the issuance of a written censure and admonition and closing the inquiry. The major Army command (MACOM) SJA reviewed the evidence and determined that Lieutenant A

1. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

2. DEP'T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION (30 Aug. 1993) (authorized by DEP'T OF DEFENSE DIRECTIVE 5500.7 (30 Aug. 1993)) [hereinafter JER].

3. See DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE (3 Feb. 1995) [hereinafter AR 27-1] (The 15 September 1989 edition of AR 27-1 was in effect at the time of the events.); DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM (10 September 1995) [hereinafter AR 27-3] (The 10 March 1989 version of AR 27-3, which was in effect at the time of events, was reissued on 30 September 1992 and 10 September 1995).

4. Sequentially numbered footnotes have been added to both PRC opinions.

violated the *Rules of Professional Conduct for Lawyers (Army Rules)*, AR 27-26,<sup>5</sup> but considered the violations minor and directed the SJA, Fort Strong, to censure and admonish Lieutenant A in writing. In May, the Fort Strong SJA recommended to the Chief, Standards of Conduct Office (SOCO), that the matter be closed.

In June, the Chief of SOCO forwarded a copy of Lieutenant A's response to the initial PSI report to the MACOM, with instructions that both the MACOM SJA and the Fort Strong SJA reconsider the report in light of information submitted by Lieutenant A. The MACOM SJA contacted the Fort Strong SJA, noting that Sergeant C had not made a written complaint, and advised the Fort Strong SJA to obtain a sworn statement from Sergeant C.

In July, Sergeant C finally made a sworn statement. She also provided a copy of Lieutenant A's business card with his home telephone number written on the back of the card.

The Fort Strong SJA and the MACOM SJA concluded that Sergeant C was credible and forwarded a supplemental PSI report to SOCO for further action.

Lieutenant A maintains that he did not ask Sergeant C out for a drink. He does not recall giving her a business card and notes that it is not his practice to give his home telephone number to clients. He admits that he advised Sergeant C that adultery is an offense under the UCMJ. He does not recall advising her not to tell anyone if she did have extra-marital sexual relations. While noting that it is not part of his usual advice, Lieutenant A acknowledges that it is possible he advised her neither to admit nor to volunteer information about a violation of the UCMJ.

### Rules of Professional Conduct for Lawyers

The *Army Rules* are applicable in this matter and *Army Rule* 1.2(d) provides as follows:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal and moral consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.<sup>6</sup>

*Army Rule* 1.7(b) also provides:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.<sup>7</sup>

*Army Rule* 8.4(a) provides that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct.<sup>8</sup>

### Discussion

There is insufficient evidence to establish by a preponderance of the evidence<sup>9</sup> that Lieutenant A attempted to date a client. Lieutenant A denies Sergeant C's allegation, and there is insufficient evidence to conclude that Sergeant C is more credible than Lieutenant A.

In evaluating the credibility of Lieutenant A and Sergeant C, The Judge Advocate General's Professional Responsibility Committee considered the following:

a. Sergeant C may have fabricated the story in discussions with her husband during a period of separation.

b. Sergeant C's husband, not Sergeant C, reported the incident to the DSJA.

c. Sergeant C was extremely unwilling to cooperate in the investigation. She initially refused to meet with the DSJA and refused to provide a sworn statement. She resisted the DSJA's efforts to obtain a sworn statement and did not provide one until seven months after the incident.

d. Although Sergeant C did have one of Lieutenant A's business cards with his home telephone number on the back, Lieutenant A may have inadvertently handed her a card with his home telephone number. The Committee notes that Sergeant C's sworn statement is not consistent with her initial report of the incident. The sworn statement does not include the claim that Lieutenant A told her to call him if she changed her mind (as he handed her his card). Given that this is not a factually complicated case in that Lieutenant A allegedly made two comments in an attempt to date a client, the difference between Ser-

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5. AR 27-26, *supra* note 1.

6. *Id.* Rule 1.2(d).

7. *Id.* Rule 1.7(b).

8. *Id.* Rule 8.4(a).

9. AR 27-1, *supra* note 2, para. 7-3d.

geant C's initial report and her sworn statement regarding one of the comments is significant.

In the course of providing legal assistance regarding a marital separation, Lieutenant A counseled Sergeant C not to commit adultery. He also advised her not to tell anyone if she did have extra-marital sexual relations. Lieutenant A's advice did not violate *Army Rule* 1.2(d).<sup>10</sup> He properly counseled her that adultery was a crime. He did not counsel her to commit a crime or assist her in criminal activity when he advised her not to tell anyone if she did have extra-marital relations.

### Findings and Recommendation

The Committee found by a preponderance of the evidence that Lieutenant A did not violate *Army Rules* 1.2(d), 1.7(b), or 8.4.<sup>11</sup> The Committee recommended that The Judge Advocate General return the action to the Chief, SOCO, to close the inquiry and notify the subject.

### Professional Responsibility Opinion 95-2

*Army Rule* 1.7(b)

*(Conflict of Interest: Lawyer's Own Interests)*

*Army Rule* 2.1

*(Exercising Independent Professional Judgment)*

*Legal Assistance Attorney improperly attempted to initiate sexual relationship with domestic relations client.*

*Joint Ethics Regulation (JER), Subpart 2G (5 C.F.R. § 2635.702)*

*(Use of Public Office for Private Gain)*

*Army Rule* 8.4(c)

*(Conduct Involving Dishonesty, Fraud, Deceit, Or Misrepresentation)*

*Army Legal Assistance Attorney deceptively solicited \$600 fee.*

### Facts

Mr. B, an attorney working at an Army installation Staff Judge Advocate (SJA) office, saw Mrs. D on three occasions in his capacity as a legal assistance attorney. On each occasion, Mrs. D sought assistance in obtaining a divorce from her husband, a soldier stationed at the same installation. She also alleged that her husband had stolen property from the government and stored that property in their home. An attorney-client relationship between Mr. B and Mrs. D existed for seven months until the divorce became final.

In two statements, Mrs. D complained that Mr. B engaged in inappropriate personal and professional conduct with her at various times while he was serving as her attorney. She specifically alleged that: (1) Mr. B provided her inappropriate advice (such as "a wife is not supposed to blow the whistle on her husband"); (2) Mr. B made unwelcome, sexual overtures and comments to her, including statements containing sexual overtones, such as references to her body or referring to her by inappropriate names ("honey" or "girly"), as well as inviting her to come to his house; (3) Mr. B called her at home late in the evening on numerous occasions to discuss topics outside of their professional relationship, to include sexual topics; and (4) Mr. B offered to handle her divorce "outside the office," for a fee of \$600 plus court costs. In addition to her statements, Mrs. D subsequently produced tape recordings of some of the telephone conversations she had with Mr. B.

The allegations were referred to the major Army command (MACOM) SJA, who appointed the installation SJA as a preliminary screening inquiry (PSI) officer to investigate the allegations. The SJA investigated the matters and concluded that Mr. B engaged in unprofessional conduct, violating provisions of the *JER*,<sup>12</sup> the *Army Rules* contained in AR 27-26<sup>13</sup> and pertinent Army regulations. The SJA, who was considering imposing disciplinary personnel action against Mr. B, recommended to the Chief, SOCO, that the PSI be closed.

Mr. B submitted a statement denying not only that he attempted to charge Mrs. D a fee for professional services, but also that he ever became emotionally involved with or made sexual advances toward her.

The SJA reviewed Mr. B's statement but adhered to his original findings and recommendations. The SJA then forwarded his PSI report through the MACOM SJA to SOCO. The Assistant Judge Advocate General subsequently appointed the Professional Responsibility Committee (PRC) to review the matter and to advise The Judge Advocate General.

### Applicable Law

#### *Joint Ethics Regulation*

The *JER* provides that an employee shall not use public office for private gain. "An employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that is intended to coerce or induce another person . . . to provide any benefit, financial or otherwise, to himself."<sup>14</sup>

10. AR 27-26, *supra* note 1, Rule 1.2(d).

11. *Id.* Rules 1.2(d), 1.7(b), and 8.4.

12. *JER*, *supra* note 2.

13. AR 27-26, *supra* note 1.

## Army Rules

AR 27-26, *Rules of Professional Conduct for Lawyers*, is applicable in this matter. Army Rule 1.7(b) provides as follows:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.<sup>15</sup>

The comments to Army Rule 1.7 note that loyalty is an essential element in the lawyer's relationship to a client. Loyalty to a client is impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The critical questions are whether a conflict is likely to arise, and if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.<sup>16</sup>

Army Rule 2.1 provides:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation, but not in conflict with the law.<sup>17</sup>

The comments to this rule note that a client is entitled to straightforward advice expressing the lawyer's honest assess-

ment. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deferred from giving candid advice by the prospect that the advice will be unpalatable to the client.<sup>18</sup>

Army Rule 8.4(a) provides: "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."<sup>19</sup> The comments to this rule note that many kinds of conduct reflect adversely on fitness to practice. However, some kinds of offenses carry no such implications. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." Although a lawyer should not engage in any criminal offense, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.<sup>20</sup>

Army Rule 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.<sup>21</sup> In this regard, it is also important to consider that no member of the Judge Advocate Legal Service (JALS) may accept payment or other compensation (excluding Department of the Army pay and allowances) for providing legal services to persons authorized to receive services at the Army's expense.<sup>22</sup> No member or employee of the JALS should advise, recommend, or suggest to persons authorized to receive legal services at the Army's expense that they should receive those services from the member or employee while off duty or from someone associated with the member or employee unless the services are furnished without cost.<sup>23</sup> Also, clients requesting assistance for services outside the legal assistance program should be referred to civilian lawyers or other offices or agencies from which such assistance may be obtained.<sup>24</sup>

## Discussion

14. JER, *supra* note 2, ch. 2, subpart 2G, § 2635.702 (reprinting 5 C.F.R. § 2635.702).

15. AR 27-26, *supra* note 1, Rule 1.7(b).

16. *Id.* Rule 1.7(b) comment.

17. *Id.* Rule 2.1.

18. *Id.* Rule 2.1 comment.

19. *Id.* Rule 8.4(a).

20. *Id.* Rule 8.4(a) comment.

21. *Id.* Rule 8.4(c).

22. AR 27-1, *supra* note 3, para. 4-3b.

23. *Id.* para. 3-7h (15 Sept. 1989). This self-referral restriction was abandoned in AR 27-1 (3 Feb. 1995) so as not to duplicate provisions of the JER, *supra* note 2, and the legal assistance regulation, AR 27-3, *supra* note 3. See AR 27-3, para. 2-7c (10 March 1989); *Id.* para. 4-7d (30 Sept. 1992); and *Id.* para. 4-7d (10 Sept. 1995). See also AR 27-26, *supra* note 1, Rule 1.5(h), which states, "An Army lawyer, in connection with the Army lawyer's official duties, may not request or accept any compensation from any source other than that provided by the United States for the performance of duties."

The PRC found by a preponderance of the evidence that, despite his assertions to the contrary, Mr. *B* engaged in conduct with his client that was contrary to his professional responsibilities to her. Specifically, the PRC found that Mr. *B* engaged in inappropriate discussions with her in an attempt to initiate a sexual relationship with her. These actions significantly impaired Mr. *B*'s professional loyalty to Mrs. *D* and his ability to provide her clear, independent, unbiased, and sound legal counsel regarding her pending divorce action. Mr. *B* attempted to use his official office and the resulting professional relationship with Mrs. *D* for personal gain by attempting to charge Mrs. *D* a fee and attempting to initiate a sexual relationship with her. Because of these financial and personal interests, Mr. *B* was unable to provide Mrs. *D* counsel with her best interests in mind.

The PRC also found that Mr. *B* not only violated Army policy, but also engaged in deceit and dishonesty by calling Mrs. *D* at her home and soliciting a fee for his professional legal services. Such actions cast doubt on his integrity, honesty, trustworthiness and fitness as a lawyer.

### Findings and Recommendations

The PRC found that Mr. *B* violated 5 C.F.R. § 2635.702 contained in the *JER*; *Army Rules* 1.7(b), 2.1, and 8.4(a) and (c); as well as the policies set forth in *AR 27-1*, paragraph 4.3(b) and *AR 27-3*, paragraph 3-7h(5).

In light of the above findings, the Committee recommended:

1. That the action be returned to the SJA for consideration of appropriate disciplinary action; and

2. Notifying Mr. *B*'s state bar about the professional misconduct.

### Pro Se Pleadings

The following message on the next page was prepared and distributed by the Legal Assistance Division, Office of The Judge Advocate General, to disseminate information regarding the Iowa Board of Professional Ethics and Conduct (Iowa Board) opinions relating to the preparation of pro se pleadings by lawyers. The message provides important guidance for all Judge Advocate Legal Services (JALS) attorneys who provide legal assistance service as part of their duties. While the opinions of the Iowa Board require Iowa licensed JALS attorneys to exercise greater caution when assisting clients in the preparation of pro se pleadings, the opinions are limited in scope and should not significantly affect our legal assistance practice. As stated in the message, JALS personnel who are considering requesting an advisory ethics opinion from a state licensing authority should first consult with their supervisory judge advocate, the Office of The Judge Advocate General Division responsible for the subject area relating to the inquiry, or the Standards of Conduct Office. Timely consultation may help resolve the question, or if an advisory opinion is required, ensure that the special considerations of military practice are fully articulated in the question and ancillary matters submitted for state bar review. The text of the message follows on page eighty-seven. Lieutenant Colonel Meyer.

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24. *AR 27-3*, *supra* note 3, para. 3-7h(5). Paragraph number 3-7h(5) remained unchanged in the 10 March 1989, 30 September 1992, and 10 September 1995 editions of *AR 27-3*.